IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2329 OF 2006
(LEAVE TO APPEAL)
IN
CRIMINAL APPEAL NO. OF 2006

M/s. Bismi Enterprises, Through its Proprietor
Mr. Abdul Nasir A. Wajid .. Applicant
v/s.
Air Marine Cargo & Forwarders Pvt.Ltd. and others .. Respondents

Mr. A.P. Mundargi, senior counsel i/by Mr. Ayaz Khan for the applicant.
Mr. P.A. Pol, APP for the State.

CORAM : B.H. MARLAPALLE, J.
DATED : 29TH AUGUST, 2007

P.C.

This is an application filed under section 378(4) of the Criminal Procedure Code praying for grant of leave to file an appeal against the order of acquittal passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai on 5th May, 2006 in C.C. No.363/S/2003, filed under section 138 of the Negotiable Instruments Act, 1881.

2. The complainant in the said case is identified as M/s. Bismi Enterprises through its proprietor Shri Abdul Nasir A. Wajid and the first accused is referred to as Air Cargo & Forwarders Pvt.Ltd. claimed to be the partnership firm and subsequently clarified in the evidence that it is a Private Limited Company. Accused Nos.2 to 4 were the three directors of the accused No.1-company though they were shown as partners. It was stated that the accused

had approached the complainant in October, 2002 for a friendly loan and it was promised to repay within 15 days. Consequently, the complainant advanced a loan of Rs.40,00,000/- in cash to the accused on 10.10.2002. The said loan was to be repaid by 25.10.2002 and on expiry of the said period when the complainant demanded, in partial discharge of their liability, the accused had issued a cheque bearing No.399824 dated 30.10.2002 for an amount of Rs.36,73,000/- as against the loan of Rs.40,00,000/- and the said cheque was dishonoured.

3. The complainant examined two witnesses i.e. Shri Abdul Nasir A. Wajid, the proprietor of the complainant as PW 1 and Shri Moise Sumar, an employee of the Development Credit Bank, Bandra Branch as PW 2. There is no dispute that the legal notices were issued to all the accused i.e. accused No.1-company and three of its directors. In the complaint, it was not clear as to whether the accused No.1 -company had received the amount of Rs.40,00,000/- or any of its directors received the said amount on behalf of the company or their personal behalf. This issue was not clarified even in the affidavit in examination in chief. It was also stated in the affidavit in examination in chief that the amount of Rs.40,00,000/- was shown by way of business transaction and reflected in the balance-sheet and that the complainant was willing to submit the same.

4. It is important to note at this stage that the evidence of PW2 clearly indicated that the subject dishonour cheque was issued from the joint account held by Shri Muzammil R. Merchant and Shri Ali Nawaz Muzammil Merchant – accused Nos.2 and 3. Accused No.2 died on 23.12.2003 and therefore, the complaint stood abated against him and the complaint stood dismissed against accused No.4. Thus, the complaint remained against accused No.1-company and accused No.3 Shri Ali Nawaz Muzammil Merchant. The cheque issued was not admittedly on account of or on behalf of the accused No.1-company.

5. In the cross-examination, the complainant admitted that in the balance-sheet for the year ending 31st March, 2003, he had shown the amount of Rs.40,00,000/- as loan to Mr. Ali Nawaz and the name of Mr. Muzammil Merchant was not appearing in the said balance-sheet. Even if it is presumed to be so, the complaint would not survive against the company as there was no debt or loan advanced to the accused No.1-company. The question is whether Shri Ali Nawaz Merchant was the borrower and the complainant accepted to be so in his cross-examination. However, in his cross-examination, he further admits when the cheque Exhibit 3 was shown to him that though name of Ali Nawaz Muzammil Merchant was printed, it was signed by Muzammil Merchant. The complainant also admits that he is doing the business of export garments in the name of Bismi Enterprises and the balance sheet brought on record was of the said firm. It is further admitted that initially a blank cheque was given and subsequently, he scribed the name of M/s. Bismi Enterprises as the Payee.

6. I am, therefore, of the opinion that the complainant could not make out a case of enforceable liability which was sought to be discharged by issuing the subject dishonoured cheque by surviving accused i.e. accused No.3. The complaint was not maintainable against accused No.1-company. In earlier part of his cross-examination, the complainant stated that loan was given to Muzammil Merchant and he has subsequently include his version by stating that he has given loan to Ali Nawaz Muzammil Merchant also. In these circumstances, the view taken by the trial court does not call for reconsideration at the hands of this court and therefore, leave to appeal is hereby refused.

(B.H. MARLAPALLE, J.)